DOES INTERNATIONAL LAW CONTAIN SANCTIONS?

by

DR. LÁSZLÓ VALKI
associate professor

Those interested in foreign policy are almost immediately informed by mass media about cases of violation of international law, and can see that the abnormal situations brought about by law violations are maintained for a long time. To the frequently raised stereotype questions (where are the sanctions of international law, coercive measures of the United Nations?) people do not expect any reply, but receive the news with acquiescence about the toll material damages, protest, exchange of notes and about the abortive session of the Security Council. The press reports about international law, having been trampled under foot, while newspaper readers think that at home, at the same time, the thieves are caught, defrauders are punished, and there are countries where even adulterers are penalized.

So, does it mean after all, that there are no sanctions and constraints in international law? According to some definitions the answer is no. According to the *Hungarian Encyclopaedia of Diplomacy and International Law* for instance, "international law is a complex of all those rules which settle inter-state relations, brought about by the states' struggles and cooperation, on the basis of agreement ... and whose observation is guaranteed by the particular state – acting individually or collectively – with *constraint*"[1]. A Hungarian university textbook – now in use – puts it in a more careful way: "international law does not lack completely the possibility of *enforcement* of legal rules either, but the means of enforcement differ significantly from those ensuring the implementation of domestic law". Then it is explained, that enforcement is applied in a decentralized way "that is, the individual states by themselves or several states together take common action in order to enforce international legal rules. Self-support is, therefore, the kind of means, primarily resorted to in order to implement international legal rules. This self-support can be a behaviour having disadvantegous effect on the state violating the law, which can take on different forms", but – apart from the defense of the attacked party – cannot mean the use of force or threats involved. In addition – the textbook goes on – the possibility of "centrally applied constraints by the community of the states" is emerging in the frame-

work of the United Nations. However, "the implementation of the norms of international law takes place without the application of any sort of constraints, in the overwhelming majority of cases", in connection with which "the role of the world's public opinion cannot be underestimated either."[2]

Károly Nagy is also of the view that sanctions and constraints play a decisive role in international law. It is beyond doubt – he states – that the way of the enforcement of international law is not identical with that of domestic law, "the difference between the two, however, is not in respect of the applicable methods, but rather in the *proportions*."[3] In domestic law, in the overwhelming majority of cases, sanctions are applied by the power – enforcement organization which is of public power character and stands above the subjects of law, but in some cases the self-defense of the attacked person, or warding off a trespass on one's own is also permitted. In international law the proportion is reversed: in the overwhelming majority of cases the offended state applies constraint through self-support against the law-violator, in exceptional cases however, the application of enforcement having public power character, by the United Nations is justified, if some state violated international peace and security with its aggressive action. According to Károly Nagy the legal enforcements in domestic and international law are similar in the fact that both are applied by the state, therefore the enforcement is of state character.[4]

We could go on with quotations, but it has already become clear from the mentioned ones that international lawyers would give a more or less positive answer to the question raised in the title, while the opinions of the experts as well as newspaper readers will somewhat differ from one another. In a peculiar way, this can be explained by the fact that both the former and the latter do start out of domestic law and take it as a basis for comparison, but just in a different way. International lawyers say that law can be not law without sanctions and enforcement, therefore these categories cannot be left out of international law either, while newspaper-readers expect international law to contain the same sanctions and constraints as the ones so frequently applied in domestic law.

What role is played by sanctions and enforcement in *domestic* law? We can cite either Marxist or non-Marxist authors, all of them consider sanction and enforcement being of decisive importance. "We call law or legal normsystem – writes *Mihály Szotáczky* – the complex of behaviour rules enforced by state *contraints* expressing the will of the ruling class."[5] "The law is nothing else but a unique social technique" – says *Hans Kelsen*, then continues: "This social technique means bringing about a behaviour through threatening with constraints, which is contrary to the desired behaviour of people."[6] *Kálmán Kulcsár* is of the opinion that "through the possibility of *enforcement*, the state power behind legal rules is a social reality which cannot be ignored (that is, by individuals), and which is an essential guarantee of validity. The possibility,

however, – he adds – can ensure the validity of the legal rule only formally, if it is not followed by an actual implementation, that is, by an effective social practice enforced by state organs as well. In the case of the violation of law the *sanction* ... must immediately follow the violation of law in most of the cases, this is the only way in which real validity can be guaranteed."[7]

Are santion and constraint identical notions in domestic law? According to some views, yes, they are. Others are of the opinion that legal sanction has the same content as legal consequence.

According to this view, every norm implies a sort of sanction which can equally be positive or negative, that is, a legal consequence having the character of either advantage or disadvantage.[8] However, I do not consider this formulation to be an appropriate one, taking into account the fact that everyday language attributes exclusively negative content to sanction. The introduction of a "more exact" wording is advisable only if the expression of the everyday language would lead to a mistaken theoretical conclusion. But this is not such a case. Sanction, in my interpretation, has by all means unfavourable consequences for the person against whom it is applied. This can mean the withdrawal of existing advantages, causing financial or other sort of disadvantage, a disapproval expressed by the authority concerned, penal measure, or even the use of direct physical (armed) force. As far as the connection between sanction and constraint is concerned, it simply means that all of the above mentioned sanctions have *compelling* effects. Naturally, not to the same extent. While disapproval only affects the behaviour of the person concerned, the successful use of physical force deprives him of the possibility to set out the behaviour alternatives by himself. The objective is therefore, to enforce a behaviour which is in harmony with the legal norms, and the medium is the application of a sanction or the prospect of using it.

Legal theory closely associates law and sanction with the notion of *state*. On the one hand, because historically, the establishment of the state meant at the same time the establishment of law, and on the other, because "the will of the ruling class, raised on the level of legal force" is implemented by a public power, separated within the organizational structure of state, which makes the classes of conflicting interests, as well as individuals living on the territory of the state and their organizations, implement it. So there is no state without law and sanction, there is no law without state and sanction and although the latter may have a number of variations, the existence of the system of legal norms, in one form or another, is always a precondition of *state* sanction. Therefore, one is conditioned upon the two others, and can function only if it takes into account the other or the third one. It is the constraint applied by the state which distinguishes the legal norm from any other (moral, religious, etc.) norms. Every norm implies a sanction, but it is only the legal norm whose implementation can be guaranted with state enforcement.

What we have discussed so far indicates that domestic law both in its emergence and implementation has the criteria of *hierarchy*. The emergence of domestic law is the final phase of a decision-making process in the course of which the central state bodies give their decisions specific form and in effect, they disclose them as orders to those concerned. Although it is true that a part of the law brought about in this way also regulates the connection of the central organizations with each other, but the hierarchical, sub- and super-ordinated relationships are determinant from the point of view of the whole legal system of the state. Through domestic law *some* regulate the life of *others*, partly disregarding whether the regulation will be approved or not. Decisions made in the most democratic way cannot be received with approval by every affected class, layer, group or individual. It has a great many reasons. Out of them – taking into account the points of view of the discussed issue – we devote attention primarily to those clashes of interests which exist between the ruling class and the other classes. But those are also significant which emerge between those groups of the ruling class which in fact exercise power and those members of it who do not belong to these groups. (The latter may not recognize their general class interests, or place their specific group or individual interest above the essential class interests.) In such circumstances the efficiency of the legal system can only be ensured by centrally applied constraints. This, naturally, does not mean that this is the only case for using constraints, in fact, in a politically stabilized society, enforcement of this character can hardly be noticed; therefore the struggle against the violations of law having other social reasons, moves into the centre of attention.

From the point of view of our subject, the essential factor is that in domestic law individuals can never regulate their own circumstances, this is always done by some others, and some others make them implement the legal rules as well. And here we have arrived at the first point which does not allow comparing the functioning of certain institutions of international law – including its system of sanctions – with that of domestic law.

Because in international law any sort of hierarchy is in effect excluded both in legislation and implementation. International relations are the contacts of sovereign states, those who are co-ordinates and are not subordinated or superior to each other. The legal norms are elaborated by the states themselves, either directly or through their organizations. None of the states can be compelled by such a legal norm which would not have been approved by it previously in some form, and in principle, none of the states are obliged to accept such norms which would be contrary to its own interests. Consequently – and also in principle –, no such norms can be accepted which would serve only the interests of some individual states and would contradict those of others. The norms of international law are not created by some to regulate the circumstances of others, but by those concerned, to regulate *their own* relations. Therefore, while *in domestic law the decision-makers and those*

concerned by the decisions are different, in international law they are identical. This conclusion may not be too original, still we are inclined to neglect it. Due to the formal similarity of domestic and international law, and due to the fact that both are of obligatory character, we tend to forget that the way of their establishment is different, although this may give rise to essential differences in content. Because domestic law cannot enjoy either *in principle or in practice* the approval of all those concerned, cannot expect them to completely and voluntarily observe law, while international law can, *in principle.*

In practice, there is not such a simple situation in international law either, since a part of the norms does not reflect identical interests. Because there are such norms whose elaboration was not preceded by consensus. Either because they were accepted under external pressure, or because the consent served short term tactical goals for any of the parties. In the case of other norms there was a consensus at the establishment of the norm, but later – due to social, economic or political changes in the participating states – it ceased to exist. This becomes clear especially following the victory of social revolutions, but minor changes can also lead to the lack of consensus. And finally, there are some norms, in case of which agreement has been reached „in general", but it is „suspended" temporarily in the given time and situation. Despite this, in international law – if we take the complex of norms – chances for voluntary, free-of-force implementation are much better than one would think when reading the front-page news of papers about various conflicts.

It should also be borne in mind that international law has somewhat *different functions* than domestic law systems[9]. Although in general terms, both serve to ensure the general social living conditions of the ruling classes, as well as –subordinated to this – the general social living conditions of the individuals in the state concerned, but in concrete terms, one can discover certain differences. The functions of domestic law include the regulation of essential social relations, first of all, the regulation of the system of property prevailing in the given state. Domestic law, therefore, contains measures on who, and under what conditions can acquire production means, in what ways properties can be alienated; it regulates the distribution of productions and the preconditions for the exchange of goods. In this way domestic law secures conditions of maintaining the prevailing way of production. In addition, it secures the power-political relations of the given state. It reflects, in some cases indirectly, in others directly, the quality of the class rule, that is, which of the classes holds power, and regulates the conditions of exercising power. Domestic law also regulates the main characteristic features of the political mechanism, the way of waging struggle for power, the structure of state organs and so on. Norms of such content cannot be found at all in international law. There are no rules in the universal international law that would cover relations of property, distribution or exchange, or that would regulate the way and conditions of exercising

political power in the given country. The only thing it does is to protect the social-economic-political system of all the states, even within that the power of the group governing the country. That means that the universal system of rules of international law leaves untouched the sphere of authority of domestic law. So if it is compared with domestic law, it cannot be called to be a legal system with class character. Consequently, changes within the states occur independent of international law in a certain respect, that is, they do not bring about the violation of prevailing norms (the consequences – as I have mentioned – is another question, because they do).

The other difference between domestic and international law, in connection with the process of the establishment of norms, is also related with the facts mentioned earlier. The possibility *to modify* or *abolish* norms is different. If the social, economic and political relations of a given state have changed, the undesired norms can be amended, or at the very last, can be abolished. Moreover, if a new class, or a new group with different political trends gains power within the former ruling class, the whole of the previous constitution can be set aside. No fundamental changes are necessary to modify domestic norms. If those in power think that any of the norms did not meet previous expectations, functioned inadequately, or further improvement of regulation became necessary, they can bring the appropriate decisions. Although this decision-making process is, in certain cases – especially in those bourgeois democratic states where the power relations are balanced between the parties –, very complicated and intricate, it is still much simpler and faster than in international contacts. Maybe, the new decision will not be more progressive than the previous one, therefore it would serve the interests of the groups in power even to a lesser extent than the preceding norm, *the case will still have a solution, thus bringing about a new legality.* The behaviour deemed yesterday illegal, law-violating, would become by today approved and lawful. Following as a matter of course, the new decision should not be approved or supported by those who, as a result of the change of the regime, became relegated to the background, as generally, the consent of classes, layers or groups having adverse interests should not be sought either. In international law, however, the agreement of all the parties concerned is needed for modification or abolishment, which is very difficult to achieve, or impossible if some continue to be interested in maintaining the validity of the prevailing norms. One of the principles of international law, the *clausula rebus sic stantibus*, provides a small possibility to unilaterally abolish a norm in case of fundamental changes in the circumstances prevailing at the time of the conclusion of the treaty. This principle authorizes the state concerned to annul unilaterally, but due to the unilateral character, it does not solve the problem of modifying or abolishing an international legal rule. Because if the contracting parties maintain their view that the circumstances, prevailing at the time of the treaty's conclusion have not changed, or not fundamentally (generally they will stick to this view if they were unwilling to approve the modification or

the abolishment), then they will deem annulment to be as illegal as a violation of the treaty would be. To settle such legally disputable situation – as I would deal with it in detail –, there is no effective international forum, and cannot be set up either.

So the current situation is that while changes in internal social, economic and political relations can be followed by domestic law with more or less flexibility and readiness, thus being able to legalize any kind of new situations, *the system of international legal norms proves to be rigid very often with the international consequences of the same changes, and is unable to legalize them.* Moreover, regardless of the fact whether the changes concerned will forward on historical progress or on the direction of reaction.

Naturally, all this can influence our image concerning the applicability of international legal sanctions. Because if a part of the law violations is brought about by the fact that the consensus, prevailing at the time of the treaty's conclusion ceased to exist as a result of internal changes in some of the states, the question may be raised: is it practical or even possible to apply any sort of legal sanction in such a case? And this question is sharply raised if the changes are interrelated with progressive social processes. One would be wrong to expect international law to use sanctions in the violation of norms rendered outdated by history.

How can we then judge the other violations of norms? Those, which cannot be attributed to social economic and political changes, or when the rigid character of international law cannot be blamed either. Or those, when the observation of the given norm (e. g. the ban on the use of force, or on intervention) is in the interest of the international community. Is not there a basis of sanctioning such norms?

In principle perhaps, there is, but the "main problem" of international law is said to be the absence of a "central power-enforcement organization" which would be able to "enforce" a behaviour in harmony with the law. In fact, this would be the main problem of international law only in that case if the establishment of any kind of central power-enforcement organization would be possible. According to historical experiences, there has never been such a possibility. Because the central power-enforcement organization, in the form in which it is existing within the state, cannot be established within the order of international relations – if we disregard the sporadic attempts aimed at realizing the imperial idea. Any kind of international armed forces can have only a "coalition" basis, that is, when states having identical foreign political objectives coordinate their military endeavours, and establish a joint command for some of their national army units. Even in this case the integration of armed forces means only the intertwining of commanding bodies; the army units continue to be of a national character. Such coalition forms have been existing to the present, too, but they always serve the achievment of certain foreign political aims, against certain external enemy. They have never represented, and do not represent supra-national po-

wer; their strength have become effective only in context with the real or supposed external enemy, in a relative way.

And this is the very essence: the establishment of a centralized power enforcement organization would be conditioned upon the *global centralization of power* as well; because every power-enforcement organization would be ineffective without having actual power. The global centralization of power, on the other hand, can only be envisaged with the establishment of a world-state. So we have arrived at the trivial truth: only the establishment of a world-state would make the general enforcement of international legal norms possible. But there is not much sense in contemplating about it.

In those days, no efforts were made to bring about a sort of centralized power within the framework of the United Nations, except for the conditions for setting up UN armed forces were established.[10] But by granting the right of veto to the big powers in the Security Council, the possibility to use the UN armed forces against either of the big powers (or its allies) as possible aggressors, was excluded from the very outset. This "coalition" solution could not be used either, since the big powers way back in 1945 had no identical foreign political objectives, which is one of the basic preconditions for the coalition's efficiency. (Consent could possibly have been reached only against the revival of revanchism.) As a result, independent of the cold war period, the UN armed forces could not have been set up at all. As is well-known, those resolutions which were brought by the UN Security Council on Rhodesia, or the Republic of South Africa, did not contain measures on armed enforcement. The "UN action" in Korea proves the above mentioned argument: taking advantage of the absence of the Soviet representative, the western powers formed quickly coalition and brought a resolution in the Security Council, thus enabling American and other armed units to illegally fight under the colours of the world organization against the Korean People's Democratic Republic and the Chinese People's Republic. As far as the so-called peace-keeping forces of the United Nations are concerned, they — as is also well-known — have never intervened against the state considered to be the aggressor, but tried to prevent different armed conflicts, even in the physical sense of the word.

If the centralized power-enforcement organization cannot be expected to apply enforcement, *what then sanctions mean in international law?*

I have already quoted in the introduction the argument of the currently used textbook, according to which, enforcement is applied in a decentralized way in international law, that is, the states individually or through joint actions together with others enforce international legal rules. *Self-support* is, therefore, the means which can be employed in order to achieve the enforcement of the international legal rules. It can take two forms: *retaliation* and *reprisal*. Both are steps taken by the offended party which can cause disadvantage in one way or another for the offending party. But while retaliation in itself would not mean viola-

ting the law (e. g. canceling diplomatic relation), the reprisal – if it is not applied as a sanction – would (e. g. unilateral annulling of a treaty). The precondition for applying reprisal is to maintain the proportions: the sanction cannot cause more severe disadvantage than the original violation of law itself. Furthermore, no armed forces can be used in reprisal, only if the law violation itself was an act of force. Generally, these sanctions can be applied only by the offended party; joint action can take place only in order to prevent armed aggression.

The use of both retaliation and reprisal is allowed by international *customary law*. There has never been a written law concerning the nature of response to be employed by the offended party (retaliation or reprisal), and the character of offence to which it is a response, whether the reaction to an offence should be an offence of identical quality, what the response can embrace, what proportionality means more exactly, etc. Therefore, the system of sanctions of international law cannot be compared to that of domestic law in this respect either, since the latter is regulated by very precise rules in most of the cases. The domestic law exactly determines the nature of procedures in the course of which sanctions can be applied, and the sphere of rights, the disputing parties have, when they try to enforce their own interests. Written international law does not contain details about these questions either. As a result, the sanction system of international law is based on a much more insecure foundation, although there are some other reasons, too.

The other main reason for uncertainty is the fact that the violation of law itself – whether it took place or not – and its judgement, cannot be legally clarified in a satisfactory manner. Because if one state has violated the law in its dealings with another state – with whom it has legal relationship – there are two possibilities. The offending party either *admits* the fact of violating the law and undertakes to face all the consequences (it is ready to pay compensation, give satisfaction for it, etc), or *does not admit*, claiming that the offence did not take place, or if it did, the offending party rejects to undertake responsibility for it. It is evident that the first case does not cause any problem. Although the violation of the law will be redressed outside the law, it will be based on an international legal rule prevailing between the two states involved. Therefore, the parties would not have a real conflict, and as a result, the problem of applying sanctions would not even be raised. The second case, however, is more complicated. If the alleged offending party is unwilling to meet the demands of the offended state, the latter cannot turn to anyone to seek justice. That would be the case when the question of applying sanctions would occur.

Legal institutions have been existing for a long time in domestic law, which may help to bring an action against the offending party of the law. Generally, in civil cases the offended party, while in criminal cases the prosecuting attorney initiates the procedure, in the course of which the court brings a *clear-cut decision* whether the violation of the law did in fact take place, if the alleged person was the offender, and whether

he would answer for his deed. The judicial process can be regarded as being a legal consequence, and naturally, further court decisions will be made within the sphere of law. In universal international law, however, there has never been a compulsorily valid jurisdiction. So what is happening there? Nothing else but the states concerned have to start settling their conflicts *outside legal jurisdiction*. The easiest way is to conduct diplomatic negotiations if the offending state is willing at all to enter into talks with the offended party. It is possible that such discussions could "lead to results", that is, a compromise is achieved. However, the nature of the compromise excludes the complete fulfilment of the maximum of the justified demands submitted by the offended state; so its content will be independent to a great extent of the de facto legal situation. A compromise is then reached taking into account a number of other factors, including the state of power relations, the subjective readiness of the parties to come to an agreement, and several others, all of which could play a role. It will have something to do with international law only from the point of view that the parties in dispute will try at the negotiations to interpret – naturally in their own way – the norms of international law. And if the discussions do not end with concrete results, and the demands of the offended party are not met, then the consequences of the violation of the law are determined by the offended party itself: whether it decides to apply sanctions against the offending party or not. This will also have nothing to do with international law, being the offended party the judge of its own case. No one can guarantee that it did, in fact have the right to apply the given sanction or not.

As far as the International Court of Justice is concerned, a disputed case can be submitted there only if the parties concerned, agreed to do so. In fact, this is also a kind of compromise. But since the offended party can legally achieve the fulfilment of the maximum of its demands, or lose the case (sometimes it simply depends on the composition of the Court), such an agreement is very rarely reached and even then in minor cases only. The verdicts brought by the Court are compulsory; they can set out the measures to be taken in order to restore the lawful conditions, but cannot order any sanction.[11]

On the basis of all this, we can state that in the current system of international law sanctions can be only a *de facto* consequence of the offence against the law, but cannot be a *de jure* consequence. Even despite the fact that the offended party judged the violation of law, and the responsibility of the offending party in an appropriate way, and applied sanctions in a proportionate manner.

Kelsen is also of the view that the above factors are the main ones causing uncertainty within the sanction system of international law. In one of his works he explains that the internal legal system never associates punishment to theft as a fact in itself; only a layman can interpret the legal nature of penalty in such a way. We express only our personal opinion – he goes on stating – when we say that X. has committed a theft. In the realm of law it is the objective opinion, which is

of decisive importance, the one expressed by a state body set up for this purpose. From the legal point of view any other opinion – about the existence of the fact determined by the legal system – is of no interest. Penalty is linked by the legal system exclusively with the facts revealed in the course of the procedure ordained by the authorities concerned. In Kelsen's view, this is the very reason why the establishment of courts was perhaps the most significant move, for it meant the setting up of a body separated from the parties concerned, which in principle, is able to evaluate facts in an unbiased way. This replaced the institution of self-support and self-judgement in domestic law. In the decentralized legal system, however, uncertainty remains: if one of the states applied a sanction against the other, it is not sure whether, according to the legal system, the given state applied a sanction or an offence against law, whether it implemented or violated the prevailing legal system.[12]

On the basis of the above statements, we should have doubts concerning the legal character of sanctions applied in international relations. Kelsen, however, himself comes to a different conslusion. He writes that in a decentralized legal system, general norms are applied in a particular case without including individual norms. (In his terminology individual norm is the ordaining of the use of sanctions by a court.) According to this, individual norms can be found in domestic law, while then cannot be found in international law, but independent of this, the sanction system of the latter can still be a legal system of sanctions.[13] But, in my view, there is nothing to justify Kelsen's joviality to the decentralized legal system. His statement quoted above can refer only to a primitively developed norm system based on self-support. The latter, however, had exceeded this stage with the emergence of courts separated from the involved parties, while international law has no such perspectives.

Herz is also arguing with Kelsen over this question.[14] He explains that reprisal is not in fact an institution of international law. If states respond to detrimental behaviour conducted against them, with a similar detrimental behaviour, then the essential factor is not whether any of the states violated the law, but if the action concerned was detrimental at all. When carrying out the responsive action, the states concerned are often not aware of the fact that they are just applying a *legal* sanction. Their behaviour can be considered as a counter-action, only in a broader sense of the term, in the course of which they may refer to law, but one cannot decide whether they do it in good or bad faith.

Herz points out that in the international scene in most of the disputed issues currently on the agenda, there is in principle, one or another kind of legal regulation. But in order to have the concrete disputes settled, on the basis of international legal rules, the parties concerned should reach agreement to this effect. So a special *compromis diplomatique* is needed which would express their readiness to apply the earlier elaborated rules in reality, and spare no efforts to settle the concrete dispute between them on the basis of those rules. This means, that in effect,

an additional stage will be interposed between legislation and implementation of the law.

According to Herz the prevailing international law obliges the parties concerned to do two things: to implement the given international legal rule, and to peacefully settle all the disputes in connection with the implementation. The current general system of international law does not contain any further guidance that *which* of the means should bring about a solution to the disputes. The parties concerned are not obliged to submit their dispute to any UN body or court, to conduct diplomatic talks or to have discussions through mediation. Therefore, in one of the states is unwilling to enter into talks with the other, or expresses special protest against mediation in general, or against the mediator in particular, nothing can be done, the case remains unsettled. Herz adds that even the acceptance of international law as a *basis for their dispute* or conducting *legal discussion* by the parties concerned, cannot be guaranteed or obliged in general.

Taking all this into account, if the offended state (or the one regarding itself to have been offended) applies reprisal, its action – according to Herz's view – cannot be considered as a legal sanction, only if the parties achieved the mentioned *compromis diplomatique*, and their conflict is settled on the basis of that. In all the other cases, "reprisal" is a *social reaction*, in the general sense of the term. Because no one has authorized the "offended state" to apply reprisal, no one can be sure if it is fully justified. Herz notes that the case of customary international law is even more complicated because the content of the legal rule is uncertain as well, which makes its implementation even more difficult. Customary law leaves even less room for settling disputes with lawful means.

On my part, I completely agree with the point of Herz. I do not question that this social reaction is a *sanction* in the most general sense of the word, but I also doubt if it means *legal* sanction in each of the cases. One of the cases, where this is especially clear-cut, is *self-defense*. The most essential rule of international law allows the state attacked by an external force to resort to all the possible means at its disposal to defend itself. The Charter of the United Nations considers this right to be "the inherent right" of the state that has become the victim of an armed attack. It is, in fact an "inherent right" – since, the state concerned will hardly ask international lawyers to decide whether it is allowed to defend itself or not. If it is able to, it will concentrate all of its forces to avert the attack and to maintain its own existence. Is it then a sanction, applied in the case of self-defense? In domestic (criminal) law, it is not. The use of self-defense will ensure only exemption for the attacked person from the criminal responsibility. Because criminal law is consistent in applying the principle that sanctions can be used only by the state; it does not deem counteractions of individuals to be sanctions. In international law, however, the situation would be completely different, taking into account the fact that simple defense can hardly be separated from reprisal, as far as their content is concerned. "Reprisal

or punitive retaliation means a more severe disadvantage than retorsion, it is such a coercive measure which would mean in itself a violation of law if being applied not in retaliation for offending against law, that is, with the purpose of sanction" – writes the textbook of international law.[15] Is the armed defense a coercive measure? Yes, it is. Would it mean a violation of the law in itself? Certainly, it would. And where are its limits? Until it is proportionate to the violation of law – is the answer, given by the textbook. However, proportionality is difficult to be laid down exactly. For instance, the question occurs whether defense can be continued beyond the national frontiers. Is it possible to occupy the enemy's territory during the war, to destroy its armament and state system? It is certain that beyond a given point it is much more than simply "defending the national frontiers", it means causing severe damages to the enemy thus preventing the danger of another aggression. Are these measures within or beyond the borders, legal consequences? One could hardly say, yes. Since there is not a body specifically devoted to find out if an aggression was in fact committed, and if yes, then by whom. There are a number of well-known armed conflicts in the course of which the series of actions and reactions constituted such a spontaneous process which had not much to do with the law.

Self-support, as a general sanction can be applied against the state not meeting its commitments, regardless of the fact whether it is considered to be of legal character or not. There is no trace in it of the common action by the international community. Kelsen, however, holds a different view. He says that individual self-support a part of the community's activity to enforce law. "The coercive measure applied in response to the delict can be interpreted as a reaction of the international legal community" – he states.[16] International realities, however, do not back up this statement. Because opinions may considerably differ in the international "legal community" depending on which of the states has committed the violation of the law. The extremely differentiated community of the states very rarely evaluates a concrete behaviour as being an offence against law directed at the whole community, and do not unanimously approve of the individually applied sanctions. (The very few exceptions include the general condemnation of the racialist policy pursued by the Republic of South Africa and Rhodesia.)

The other factor of uncertainty within the sanction system of international law is linked with the probability of the application of self-support. *Weber* says that one of the important characteristic features of the (internal) legal system is the fact that its existence "is externally guaranteed by the *probability*, that the body specifically set up by the people with such purpose, will apply physical or psychological *constraint* to enforce the observation of order, to retaliate disobedience".[17] And not a weak probability: "Clearly – he writes whithin another context – in individual cases the most varied factors may contribute to ensuring the implementation of an order, but we can speak about *guaranteed* law only if it is probable that in the given case constraints, legal constraints will

emerge for the sake of enforcement". So in such cases "the group of people, set up for this purpose, will act even if only the norms were violated, that is, for mere formal reason, too".[18] Well, it hardly should be proved that in international law one does not find the motive of acting for the constraint itself, against the violation of law, and there is no probability for applying constraints either. In order to achieve that we could speak about probability in international law, it would be necessary that all the states whose rights were violated, have the same possibility to apply constraints and are similarly interested in it. In international contacts however, mostly those states resort to self-support who should not fear a more severe counter-action and who may expect enforcement to restore the legal state of affairs in effect. It is evident that the extremely differentiated composition of the international community as well as the different nature of certain bilateral power relations do not always make this possible. There are some states who can afford applying constraint against ones but not against others, and the other way round, there are states on whose part constraints can be expected as a response to the law violation, and there are others who are not likely to react to it with enforcement. The balanced power relations of the leading powers of our age exclude the possibility of such a situation in which any of the states could continously neglect its international legal commitments, with regard to anyone else.

Naturally, all this is true in connection with the interests. The state whose rights have been violated may not always be interested in applying its right of self-support against the offending state. It rather refrains from that, being well aware of the fact that worsening their bilateral contacts could lead to more detrimental consequences than the retaliation of a minor violation of law. This factor can also reduce the probability of applying constraint and considerably contributes to the uncertain character of international legal sanctions.

Those who attribute significance to sanctions and constraints in the implementation of international law, I think are wrong when they confuse the mere theoretical *possibility* with the social *probability*. Naturally, it is justified to point out that every offended state has the right to use self-support, even the means can be enumerated which can be resorted to, rules can be analysed in detail which deal with the possible application of armed constraints carried out within the framework of the world organization, and a number of theories on sanctions can be based upon these, but the real question is in effect decided by the fact whether or not in the case of law violation there is a de facto probability of applying legally regulated sanction. All that have been explained so far, as well as the empirical experiences lead to the conclusion that there is no such probability. And when one of the states applied sanction against the behaviour of the other, even then one does not know for sure if it did have the right to do so, since it is very difficult to find out reliably – and most important of all, "lawfully" – whether the law was in fact violated, and by whom.

The sanction applied against unlawful behaviour – especially when used as retaliation – can be, from the sociological point of view, hardly differentiated from the reaction which is the consequence of not an unlawful but only a detrimental attitude. Since the offended state applies the sanction not primarily because the action is unlawful, but because it is detrimental. It would like to overcome, in one way or another, the damages caused by the disadvategous effects of the action, or would like to prevent its partner from causing disadvantages in the future. This is also true when the offended state did not suffer any grievance, still it applies counter-measures, because the behaviour of the other state had a serious influence on its own interests. If the counter-measures take the form of not unlawful but a detrimental behaviour, this also means retaliation and the counter-measures will have the same consequences as the ones in the previous case. Neither of the types of reactions is regulated by international law, no details can be found as to what sort of counter-measures can be taken. Practically, the process is going on *outside the sphere of the law* in both cases.

So there are significant differences to be discovered between the sanction systems of the international law and domestic law. It is worthwhile comparing these with Weber's notions. *Weber* also starts out of the differences appearing in the sanction system when he differentiates between the conventional order and legal order. In his view, social activity, social relations can be based by the participants always on an image concerning the existence of a legal order. We can speak about *order* when the participants base their activities upon suppliable "maxima", whose acceptance is contributed to by the fact that they are considered to be valid – obligatory or a pattern to be followed – concerning the activity. The order can be *conventional* "if its validity is externally ensured by the probability, that the one who violates it should have to face a general and practically manifested *disapproval* of a certain group of people". We speak about *legal* order "if it is externally guaranteed by the probability that a special body of people set up for this purpose will apply physical or psychological *constraint* to enforce the observation of order, to retaliate disobediance".[19] "The two kinds of order – adds Weber – differ from one another exclusively from the point of view of the sociological structure of constraint, since in the case of convention, there are no people who would be ready to put an enforcing constraint into operation."[20] He points out in another part that he deems international law to be a conventional order. But, in my view, the definition of this cannot be applied completely to international law. As I have noted in other contexts, in international life, the violator of "convention" meets very rarely with a "general and practically manifested disapproval". Disapproval is restricted to a much narrower circle, that is, generally to the offended party, and – in the case of a more serious offence – to its friendly states and allies. But this is not too much, especially, if the negative evaluation of a group of states is confronted with an active approval on the part of another group of countries. Di-

sapproval has a greater role rather in smaller human communities (originally Weber also mentioned such communities). Individuals are less able to cope with the objection of their surrounding community for a long period of time, while a state can neglect – often without any further consequences – the clearly expressed disapproval of the other states.

As far as I am concerned, I would not start out from the facts of approval or disapproval, but from the *interest* which contributes to the establishment of international legal norms by the state. One should not go too far to find these interests which are manifested quite clearly. A library could be filled up by the books devoted to the analysis of the increasing internationalization of production, the deepening of the mutual interdependence of states, the emergence of the balance of power brought about by the revolutionary changes in military technology, that is, all those factors which increased the interests of the states in coordinating their activity, maintaining international security, and preventing conflicts that have the imminent danger of leading to armed clashes. No new discoveries are required to ensure these interests. The method is well-known: to establish such a *system of behaviour norms*, which are universal, regional or particular, depending on the nature of the interests, which constitute a firm basis to be relied on, to provide foundation for cooperation and increase the possibility to forecast the prognosis of the attitudes of the parties concerned in international relations. Interests, appearing almost in an identical way and to the same extent for all the states, can bring about cooperation and consensus needed in order to lay down the norms and concrete ways and means of cooperation. These objective interests linked with cooperation guarantee the respect of norms of international cooperation in such a community which is decentralized from the political and power points of view, and which is unable to set up a central power-enforcement organization.[21] Compared to this, international legal order should not be called as a system of constraints, we should not endeavour to prove the existence of a sanction system in this sphere too, similar to that of domestic law, even by neglecting realities. It is enough if we regard sanctions – in a broader sense of the term – in the *reduction or lack of readiness to cooperate*. Because when one of the states applies retaliation or reprisal against another, offending the norms, the stress is not on causing disadvantage in itself, but on the fact that the other state suffering the grievance would be unwilling to continue cooperation upset by the law violation, according to the previous practice. Moreover, if the law violation was a more significant one, the state concerned may decide to reduce or even discontinue cooperation not only in the sphere concerned, but in all spheres of bilateral contacts.

So, using Weber's terminology, *conventional international order is the one whose validity is guaranteed by the probability that its violator can except the absence of readiness to cooperate, or a reduction of cooperation on the part of the offended state, or states.*

Naturally, it can happen that the state offending the conventional order has to face physical constraint, applied if not by a separate body, but by the offended state. Weber does not exclude this possibility in his above quoted explanations either: "Revolt against every convention may lead to a punishment of enforcement by the surrounding, on the basis of its guaranteed subjective rights ... This means that in such cases the conventional rules are indirectly supported by means of enforcement."[22] Since general international law does not acknowledge the possibility of using force, not even in retaliation for the violation of law, armed forces can be deployed only for defense purposes. Therefore "the revolt against *every* convention" cannot result in an armed action of the environment, but only that who threatens the existence of the conventional order itself – that is, the international order – or the existence of one of its members.

So far I have only compared the international legal santion with the domestic legal sanction. However, the image appearing about the latter one would not be complete, since in the comparison I always took the *substantial* features of domestic law as a basis. So I have to add now some factors of *non-substantial, secondary character of the implementation of the domestic legal sanctions*. These will provide further additional details to understand why international law cannot be judged on the basis of requirements of the domestic law.

The most important of such factors is that sanctions cannot be applied against every person committing an act against the law in domestic law either. Because in criminal law for instance, the following factors have to be ensured: 1. the committed act becomes known and learned about by the authorities as well; 2. the person of the offender is known; 3. the committed crime is provable; 4. conditions excluding or eliminating the possibility of penalty does not exist; 5. the attorney is ready to indict; 6. the court comes to the conclusion that the infliction of a sanction (penalty) would effectively serve the improvement of the accused as well as the protection of the society. Clearly, it happens very rarely that all the conditions are ensured.

According to the estimation of criminologists, about 30 to 60 per cent of the criminals are never impeached (the proportion is changing from country to country), due to the reasons mentioned in the first two points. It is a well-known fact that in certain countries impeachment can be postponed for years in special cases, even it can be dropped, and several criminals escape punishment even if their crime has been proved.

The situation is not much more favourable in other branches of law either. Are all the tenants who fail to pay the rent evicted? – asks *Fried* in his article about the efficiency of international law. Can one member of the divorced couple be compelled to leave the apartment if the court brought a sentence to this effect? – we could also raise the question in Hungary. Fried notes that public opinion evaluates the violation of international law not primarily on the basis of legal notions of civil or political law, but compare it in most of the cases with crimes. For this

very reason – he adds – international law should be "de-criminalized". Because one should not forget that international law constitutes one undifferentiated entity in the current phase of its development, contrary to domestic law which is divided into several branches (criminal law, civil law, etc.). The regulation methods of the latter ones are completely different, therefore their system of sanctions is also varied. The principle of "every thief should be punished" is consequently not applied even by crimical law, not to mention the other branches of law.

International law can be expected even to a lesser extent to follow that principle strictly in every case. Punishment is only one of the means the society has at its disposal in the struggle waged against delinquency. Criminology – Fried states – has always placed emphasis on the *complex* system of social measures. In other fields (e. g. violation of the law by a civil servant) the possible social reaction can range from a simple informal warning through formal disciplinary punishment to criminal impeachment – depending on the weight of the action committed[23].

In connection with domestic law we have mentioned that its main feature is the sub- and super-ordinated interrelationship of people guiding others' behaviour and those guided. Law, however, regulates other social relations, too, including the connections between those who guide and who are guided.

In addition, every proper law system ensures several rights and privileges against those guiding, that is, various bodies of central state power and state administration. Would it be possible to apply a sanction – let us say – in respect of two leading state administration bodies, if one of them violated the norms regulating their contacts ? Can a sanction be applied against a leading body if it does not ensure in effect the implementation of the right of people belonging to its leadership ? Trying to answer such questions, the constitutional lawyers either leave the actual development of social-political relations out of account and give a formal reply, or say that the activities of higher bodies generally are not covered by the sphere of authority, effectively regulable by law. The average reader of papers, on the other hand, recalls all the things he has read about such cases, about reshuffling the governments, resignation of ministers. The only thing he cannot decide is always: who violated the law – the one who was dismissed, or the others who decided the dismissal. Because there is no judicial body which would be able to pass a judgement. As there is no such institution either which would be able to supervise the decisions brought in the top political sphere. Although *Géza Marton* wrote in this context as early as in 1910 that "every constitution contains in its parts on regulating the operation of the top bodies of state, such articles whose implementation through enforcement is impossible".[24] Regarding their content, such norms have more conventional elements since they in fact express a compromise – or what is the same – the consensus of those being in power. When these norms are violated, it is the political power-relations and not legal considerations which finally decide the matter. But if the debate emerging in this

way assumes a political character, this will mean only that the conflicting parties resort to *legal means*, too, in the political struggle.

And all this leads to the conclusion that the application of sanctions by domestic law is not a simple automatic process as held by public thinking. Domestic law also has such elements, which – as far as their content goes – are very similar to international law and which, according to the changes in political power-relations, are implemented with the total negligence of the classical system of legal sanctions.

My reply to the question raised in the title is that sanctions – in the *legal sense* of the term – are contained only occasionally by international law; consequently it does not characterize this legal system. The violation of the law, on the other hand, may have certain *social* consequences, which, regarding their essence, mean the reduction or discontinuation of cooperation on the part of the offended party in political, economic, cultural and other fields of life. The implementation of international law is guaranteed not by categories of contraints but by the interest the parties have in cooperation.

NOTES

[1] Ed.: *Gyula Hajdu.* Budapest. 1967. p. 622 (in Hungarian).

[2] *György Haraszti – Géza Herczegh – Károly Nagy:* International Law. Budapest, 1976. pp. 20 – 21 (in Hungarian).

[3] *Károly Nagy:* Some Questions of the Classification of International Law, Its Place in Legal System, in the Light of the General Notion of Law. *Jogtudományi Közlöny*, 1972. No. 1 – 2, p. 44 (in Hungarian).

[4] Ibid.

[5] *Mihály Szotáczky:* The Essence of Law. Budapest, 1970. p. 84 (in Hungarian).

[6] *Hans Kelsen:* Law as a Specific Social Technique. In: Studies on Modern Theories of Civil Law. (Ed.: *Csaba Varga.*) Budapest, 1977. p. 7 (in Hungarian).

[7] *Kálmán Kulcsár:* Foundations of Legal Sociology. Budapest, 1973. p. 352 (in Hungarian).

[8] See: *György Antalffy – Mihály Samu – Imre Szabó – Mihály Szotáczky:* State Law and Legal Theory. Budapest, 1973. p. 352 (in Hungarian).

[9] I explain my views in detail im my study: *The Social Functions of International Law. Valóság*, 1978. No. 11 (in Hungarian).

[10] See: *Árpád Prandler:* The Security Council of the United Nations. Budapest, 1974 (in Hungarian).

[11] The 2nd point in Article 94, of the UN Charter says, that if any party to a case fails to perform the obligations incumbent upon it under a judgement, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or resolutions. The Security Council, however, has never brought a decision on the basis of this authorization.

[12] *Kelsen:* Ibid, p. 19. It is also written by *Lauterpacht*, that international law is not a real and reliable law without a properly functioning court. Law cannot fulfil its original function, if the rules of behaviour are constantly a matter of dispute. In his view the law is lacking "the external character". (The Function of Law in the International Community. Oxford, 1933. p. 425.)

[13] *Kelsen:* ibid., p. 21.

[14] Where he can do this more courageously than in the volume of studies published in memory of *Kelsen: John H. Herz:* The Pure Theory of Law Revisited. Hans Kelsen's Doctrine of International Law in the Nuclear Age. In: Law, State and International Legal Order. Essays in Honor of Hans Kelsen. (Ed.: *Salo Engel* and *Rudolf A. Métall.*) Knoxville, 1964.

[15] *György Haraszti – Géza Herczegh – Károly Nagy:* ibid., p. 366.

[16] *Hans Kelsen:* Principles of International Law. 2nd edition, New York. 1967. p. 17.

[17] *Max Weber:* Economy and Society. Budapest, 1967. p. 61 (in Hungarian).

[18] *Max Weber:* Rechtssoziologie. Neuwied am Rhein und Berlin, 1967. pp. 72, 74.

[19] *Weber:* Economy and Society. pp. 60 – 61 (in Hungarian).

[20] Ibid., p. 113.

[21] See, *Karl W. Deutsch:* The Probability of International Law. In: The Relevance of International Law. (Ed.: *Karl W. Deutsch* and *Stanley Hoffmann.)* Cambridge (Massachusetts), 1968. p. 71, and *A. V. Levontin:* The Myth of International Security – A Juridical and Critical Analysis. Jerusalem, 1957. p. 5.

[22] Economy and Society. p. 110.

[23] *John H. E. Fried:* How Efficient Is International Law? In: The Relevance of International Law. p. 101, 102.

[24] *Géza Marton:* On the question of the Legality of International Law. Budapest, 1916. p. 6 (in Hungarian).

ЕСТЬ ЛИ САНКЦИЯ В МЕЖДУНАРОДНОМ ПРАВЕ?

ЛАСЛО ВАЛКИ

доцент

(Резюме)

Общее понятие права необходимо включает в себя нормы принуждения, его неотъемлемая часть – категория санкции. Подавляющее большинство юристов-международников сходится во мнении, что и для этой отрасли права главной характеристикой является способ принуждения, с чем автор данной статьи не согласен.

В качестве довода указывается на то обстоятельство, что условия исполнения норм международного права и тождественны условиям внутреннего права. Во внутреннем праве всегда одни осуществляют правопорядок, диктуют нормы поведения другому, и даже наиболее демократично вынесенные решения не могут удовлетворять интересы одновременно всех, участвующих в данном правоотношении, классов, групп, прослоек или индивидумов. При таком положении исполнение норм может быть обеспечено лишь путём принудительных мер, т.е. применения санкции. А в сфере международного права государства выступают одновременно и как правотворители и как носители данной правовой нормы: государства по общей договорённости определяют нормы своего поведения. Таким образом теоретически нет необходимости применения мер принуждения, поскольку эти нормы одинаково служат интересам всех сторон, участвующих в данном международном правоотношении.

Но в международной практике существуют нередкие примеры, когда в результате столкновения интересов возникает такое разногласие между государствами, которое ведет к нарушению одной из сторон принятой правовой нормы. В этом случае потерпевшая сторона может применить по отношению к государству-правонарушителю меры воздействия (риторзия или репрессалия), иными словами она правомочна на применение санкции. При существующей международной структуре, однако, невозможно решить, имело ли право государство использовать по отношению к другому данное конкретное действие в качестве санкции, или не явилось ли само конкретное действие правонарушением. Здесь нет такого форума, который – подобно существующему в системе внутреннего права – смог бы во всех случаях с юридической силой определить данное поведение государства. При таком положении противным сторонам не остается другого, как самим внеправовым образом приступить к разрешению конфликта. Но такое, используемое в качестве санкции, поведение государства в существующей системе международного права может быть квалифицировано лишь как фактическое, а не правовое последствие правонарушения.

Что касается содержания такого поведения государства то, согласно автору, оно тоже не имеет себе равного среди санкций внутреннего права. Применяемая государством санкция довольно редко проявляется как принуждение в его тесном смысле слова, поскольку чаще всего она выражается фактором прекращения или приостановления состояния сотрудничества.

Исходя из вышеизложенного, автор – пользуясь терминологией Вебера – называет международным правопорядком такой конвенциональный порядок, действенность которого обеспечивается вероятностью для государства, нарушившего такой порядок, обнаружить со стороны пострадавшего государства (государств) сокращение или прекращение ранее проявленной им (ими) готовности к сотрудничеству.

VERFÜGT DAS VÖLKERRECHT ÜBER SANKTIONEN?

Von

DR. LÁSZLÓ VALKI

Universitätsdozent

(ZUSAMMENFASSUNG)

Nach der Rechtstheorie gibt es kein Recht ohne Sanktionen. Der Verfasser untes sucht in seiner Studie die Frage, ob diese These auch für das Völkerrecht gültig ist. Er stellt fest, daß es falsch ist, die Kategorien des Völkerrechts auf Grund des Begriffsystem des staatlichen Rechts zu beurteilen. Im staatlichen Recht regeln nämlich immer einzelne die Lebensverhältnisse anderer und sogar die meist demokratischen Entscheidungen lösen das Einverständnis aller Klassen, Schichten und Einzelnen nicht aus. Unter solchen Verhältnissen kann die Einhaltung des staatlichen Rechts nur durch Sanktionen erzwungen werden. Im Völkerrecht ist aber der Kreis der Entscheidenden und der durch Entscheidungen Verpflichteten derselbe. Die Sanktion ist prinzipiell unnötig, weil die Einhaltung der Entscheidungen im Interesse aller Teilnehmer liegt.

In der Praxis ist die Situation natürlich etwas anders. Die Interessengegensätze lösen Rechtsverletzungen aus. Diese Rechtsverletzungen werden aber – im Gegensatz zum staatlichen Recht – fast nie auf dem Rechtsweg beurteilt, infolgedessen kann bei der Anwendung der Selbsthilfe niemand mit Gewißheit sagen, ob die Selbsthilfe eine rechtsmäßig angewandte Repressalie oder ein rechtswidriger Akt war. Die Konflikte werden in der heutigen internationalen Situation nicht auf dem Rechtswege, sondern durch diplomatische Verhandlungen erledigt, wenn sie überhaupt erledigt werden. Die Sanktion ist im Verhältnis dazu nur de facto und nicht de jure Folge der Rechtsverletzung.

Als Schlußfolgerung betont der Verfasser, daß die internationale Sanktion nicht als Zwangsmaßnahme auftritt, sondern als Aufhören oder Verminderung der Kooperationsbereitschaft der beleidigten Partei erscheint.